1976

Myron Brough v. Roman R. Appawora : Petition for Rehearing

Utah Supreme Court

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[redacted] IN THE SUPREME COURT

OF THE STATE OF UTAH

MYRON BROUGH, Plaintiff and Respondent,	:	
vs.	:	Case No. 14434
RAMON R. APPAWORA, Defendant and Appellant.	:	

APPELLANT'S PETITION FOR REHEARING AND BRIEF IN SUPPORT OF PETITION FOR REHEARING

* * * * * *

Appeal From the Order of the Fourth Judicial District Court for Uintah County
Honorable Allen B. Sorensen, Judge

* * * * * *

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PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF.

PETITION FOR REHEARING

TO: The Honorable Members of the Supreme Court of Utah:

Pursuant to Rule 76(e) of the Utah Rules of Civil Procedure, Appellant, Ramon R. Appawora, respectfully petitions the Court to grant a rehearing in the above entitled case. The appellant is not unmindful of the general reluctance of the Court to hear the continued protestations of disappointed parties, but appellant respectfully submits that the impact of the majority decision is so great, the conclusion reached is so untenable, and that the underlying assumed facts not in evidence are so far from the truth, that it is appropriate for the Court to grant a re-hearing herein.

The grounds for this petition are that the majority has made numerous findings in support of its conclusions which are without substance and contrary to fact. In order of their appearance in the majority opinion, they are as follows:

1. The majority opinion states that the defendant claims that the reservation encompasses all lands "within the drainage of the Duchesne River from the snowcapped mountains on the north to the snowcapped mountains on the south," when in fact this language is taken from page 5 of plaintiff's brief, quoting an unnamed "layman." Defendant claims that the Uintah reservation in question was created and defined by the Executive Order of October 3, 1861 and confirmed by the Act of May 5, 1864 (13 Stat. 63).

2. The majority opinion states that the Ute Tribe's reservation was set apart by treaty "with the ancestors of this defendant," when in fact no such treaty exists relating to the Uintah Reservation and no treaty rights have been or could be asserted by defendant. The reservation was created by the President and Congress as indicated next above.

3. The majority opinion states that "with the advance of civilization and the increase in population, it was considered advisable" to sell Indian Lands, when in fact the federal government's Indian allotment policy between 1887 and 1934 was to make allotments to Indians and, with the consent of the Indians, to open their reservations to non-Indian settlement while at the same time

preserving the existence of the reservations. See Moe v. Salish and Kootenai Tribes, __ U.S.__, 48 L.Ed. 2d 96, 109, 96 S.Ct. ___(1976).

4. The majority opinion states that the "remaining land" not "chosen" by the Indians (allotted lands), "was sold to the government," when in fact the lands were sold to homesteaders with the funds derived therefrom held in trust for the benefit of the Tribe. Beneficial title to unallotted lands not sold to homesteaders remained at all times in the Indians. See Hanson v. U.S., 153 F.2d 162 (10th Cir. 1946) and Ash Sheep Co. v. U.S., 252 U.S. 159, 64 L.Ed. 507, 40 S.Ct. 241 (1920).

5. The majority opinion states that Theodore Roosevelt's proclamation in 1905 "placed the land of the Indian reservation not theretofore allotted to Indians back on the public domain," when in fact that proclamation did no more than open such unallotted lands to limited entry under the homestead and townsite laws of the United States. See 34 Stat. 3119.

6. The majority opinion states that "Congress appropriated funds to pay for the land thus transferred, and the Indians accepted the money," when in fact the statute footnoted did no more than appropriate $70,064.48 to pay the Uintah and White River Indians for allotments made on their reservation to other Indians. No money was appropriated to pay for lands opened to non-Indian settlement. See 32 Stat. 245,263.

7. The majority opinion states that, by receiving judgment funds for the loss of reservation lands in Colorado, "the Indians lost all rights which they or their ancestors ever had in or to the land not theretofore allocated to them," when in fact there is no legal or factual connection between the payment of those funds and the present or past rights of the Ute Indians in the Uintah Reservation of Utah.

8. The majority opinion states that "No longer can an Indian migrant carry about him a protecting mantle which makes him immune to the law of the land", when in fact the Ute Indians on their reservation are now and always have been subject to both federal and tribal laws which are the "law of the land." The so-called "migrant Indians" had resided in the Uintah Basin since time immemorial and were officially settled there more than 50 years before the first non-Indians.

9. The majority opinion stresses that "the government has altered its general policy toward the Indian tribes" and no longer regards them as "sovereign nations," yet the court chooses to ignore the fact that the Congress and the Courts have consistently recognized that

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, ***; they are "a separate people" possessing "the power of regulating their internal and social relations." U.S. v. Mazurie, 419 U.S. 544, 557, 42 L.Ed. 2d 706, 95 S.Ct. 710 (1975).

This case also recognized the appropriateness of tribal courts hearing cases involving non-Indians. See also the Indian Self-Determination Act of 1975 (25 U.S.C. Section 450 et seq.).

10. The majority opinion states that "The Ute nation, of the long-ago treaty, no longer exists," when in fact the Ute Indian Tribe is alive and well, organized under federal law and expressly recognized by both the Congress of the United States and the Bureau of Indian Affairs. See Record, page 20.

11. The majority opinion states that Ute Indians "are now citizens of the United States" and that "when a nation ceases to exist, its treaties are no longer of any force or effect," when in fact Indian citizenship is undisputed. The defendant makes no claim to any treaty rights nor has he expressed unwillingness to accept the duties and responsibilities of citizenship, but merely claims the right to have this action enforced in the proper forum.

12. The majority opinion relies on the decision of De Coteau v. District Court as support for its conclusion, when in fact that decision involves a radically different legislative fact situation involving a South Dakota Indian reservation in which the Indians voluntarily sold and ceded land by agreement and which, by comparison, indicates the completely inappropriate nature of the conclusion reached in the majority opinion.

13. The majority opinion states "To declare the law

to be as claimed by the appellant would be to abandon all forms of due process and permit an enrolled Indian to commit crimes or torts at will and be immune from any accountability to the law of the land," when in fact defendant has urged only that the instant matter not be heard in State Court conceding that jurisdiction would lie in the Ute Tribal Court, a forum made expressly subject to the due process standard by the Indian Civil Rights Act of 1968 (25 U.S.C. Section 1302(8)). An Indian is accountable in federal court for major felony crimes, including murder (See 18 U.S.C. Section 1153) and is accountable to the Ute Tribal Court for all other crimes as well as civil liability.

15. The majority opinion states that "to permit an Indian who commits a murder . . . to show disdain for the prosecuting officials and claim the sanctuary of the tribal method of procedure is unthinkable," when in fact this unfounded hypothetical situation is squarely within the exclusive jurisdiction of the United States under 18 U.S.C. Section 1153.

Based on these erroneous assumptions, the majority opinion reaches the completely unwarranted conclusion that the Ute Indian Tribe's reservation has been terminated, its governmental existence extinguished, and that, as a result, its members are subject to state court jurisdiction. The following brief will demonstrate that this result should be reconsidered by further hearing.

BRIEF IN SUPPORT
OF PETITION FOR REHEARING

Statement of Facts

The facts actually before the court have been set forth in defendant's previous briefs and noted in the dissenting opinion. The serious factual misstatements upon which the majority opinion is erroneously based have been enumerated above.

ARGUMENT

Point I

THE MAJORITY OPINION'S JUDICIAL NOTICE OF FEDERAL LAW RELATING TO THE PRESENT STATUS OF THE UTE TRIBE'S RESERVATION WAS DEFICIENT, INCOMPLETE, AND IN DIRECT VIOLATION OF THE RULES OF THIS COURT.

The majority opinion has apparently circumvented the requirements of both federal (see 25 U.S.C. Section 1321 et seq.) and Utah State law (see Section 63-36-9 et seq.) by holding that the Uintah and Ouray Reservation has been terminated, that the Ute Tribe possesses no governmental or judicial powers, and that the members of the Ute Tribe are entitled to no rights as reservation Indians therein.

The majority opinion cites only the meager authority of one federal statute and one presidential proclamation as justification for its conclusion that Congress has somehow terminated the Ute Tribe's reservation and perhaps its very existence as well. (See footnotes 1 and 2 in the majority opinion.) The majority opinion has overlooked or failed to consider a

staggering number of additional statutes and authorities which have provided both legislative and judicial recognition of the Uintah and Ouray Reservation, and the Ute Indian Tribe from 1861 to the present day.

According to the case of De Coteau v. District County Court, 420 U.S. 425, 43 L.Ed.2d 300, 95 S.Ct. 1082 (1975), upon which decision the majority opinion relies, in order to determine the existence of the Uintah and Ouray Reservation, this Court must consider the following criteria to which are footnoted a representative sample of the statutes and authorities which the Court has either overlooked or failed to consider: the creation of the Uintah and Ouray Reservation 1/; Congressional treatment of the reservation prior to 1902 2/; Congressional Acts specifically dealing with the making of allotments to the Ute Indians and the opening of the reservation to non-Indian settlement - 1902 to 1905 3/; Congressional recognition of the reser-

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Footnote 1: See the Executive Order of October 3, 1861 (I Kappler 900); Act of May 5, 1864 (13 Stat. 63); Executive Order of January 5, 1882 (I Kappler 901); Act of March 11, 1948 (62 Stat. 72).

Footnote 2: See e.g., Act of February 8, 1887 (24 Stat. 388); Act of March 3, 1887 (24 Stat. 548; Act of May 24, 1888 (25 Stat. 157); Act of August 15, 1894 (28 Stat. 286, 337); Act of June 10, 1896 (29 Stat. 321, 341-2); Act of June 7, 1897 (30 Stat. 62, 87); Act of June 4, 1898 (30 Stat. 429); Act of March 1, 1899 (30 Stat. 924, 941).

Footnote 3: Act of May 27, 1902 (32 Stat. 245, 263); Joint Resolution of June 19, 1902 (32 Stat. 744); Act of March 3, 1903 (32 Stat. 982, 997); Act of April 21, 1904 (33 Stat. 189, 207); Act of March 3, 1905 (33 Stat. 1048, 1069); Proclamation of July 14, 1905 (34 Stat. 3119).

vation from 1905 to the present 4/; administrative treatment of the reservation by the Department of the Interior subsequent to 1905 5/; and other judicial authorities recognizing the continued existence of the Ute Tribe's Reservation 6/.

The majority opinion has misconstrued and overlooked these material authorities which were not heretofore presented because the issue of reservation status was not and is not before the Court and the majority opinion's decision in this regard was not reasonably foreseeable.

Since judicial notice has already been taken of materials not in the record, defendant submits that it is particularly important that a rehearing be granted and that

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Footnote 4: See e.g., Act of April 4, 1910 (36 Stat. 269, 284); Act of March 11, 1948 (62 Stat. 72); Act of March 10, 1950 (64 Stat. 19); Act of August 27, 1954 (68 Stat. 868); Act of August 9, 1955 (69 Stat. 544); Act of July 14, 1956 (70 Stat. 546); Act of August 2, 1956 (70 Stat. 936); Act of September 14, 1961 (75 Stat. 916); Act of September 18, 1970 (84 Stat. 843).

Footnote 5: See e.g., Secretarial Order of August 25, 1945 (10 Fed. Reg. 12409); Public Land Order of October 1, 1959 (24 Fed. Reg. 8175); Public Land Order of February 21, 1961 (26 Fed. Reg. 1718); Secretarial Order of October 1, 1971 (36 Fed. Reg. 19920).

Footnote 6: See e.g., State v. Roedl, 107 Utah 538, 155 P. 2d 741 (1945); Hanson v. United States, 153 F.2d 162 (10th Cir. 1946); Affiliated Ute Citizens v. United States, 406 U.S. 128, 31 L.Ed.2d 741, 92 S.Ct. 1456 (1972); The Ute Indian Tribe v. State Tax Commission of the State of Utah, No.C.-74-183, D. Utah, Central Div., Judgment dated February 25, 1976 (appeal docketed, U.S. Tenth Circuit Court of Appeals).

additional judicial notice be taken of the matters indicated in this brief, particularly in light of the requirement of Rule 12(4) of the Utah Rules of Evidence which requires that:

> A...reviewing court taking judicial notice of matter not theretofore so noticed in the action shall afford the parties reasonable opportunity to present information relevant to the propriety of taking such judicial notice and to the tenor of the matter to be noticed. (Emphasis added).

Point II

THE MAJORITY OPINION UNLAWFULLY DEPRIVES APPELLANT OF RIGHTS ACCORDED AND GUARANTEED HIM BY STATE AND FEDERAL LAW.

A. APPELLANT'S RIGHTS UNDER 25 U.S.C. SECTION 1321 ET SEQ. AND SECTION 63-36-9 ET SEQ. U.S.C. 1953, HAVE BEEN HELD TO VIOLATE THE DUE PROCESS CLAUSES OF THE FEDERAL AND UTAH CONSITUTIONS.

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25 U.S.C. Section 1321 et seq. and Section 63-36-9 et seq. U.C.A. 1953, each quarantee that reservation Indians shall not be subject to state court jurisdiction unless the consent provisions of 25 U.S.C. Section 1326 and Section 63-36-10 U.C.A. 1953, have been complied with. The record herein clearly states that the Ute Indians have never given such consent to the assumption of Utah State jurisdiction. See Record, page 21.

The majority opinion declares that these statutes,

assuring tribal court jurisdiction over reservation Indians must be unconstitutional.

> Any statute or court decision which would prevent an enrolled Indian from being tried under the law of the land for a tort or crime committed by that Indian would be in contravention of the due process clause of the Constitution. Majority Opinion, page 2 (Emphasis added).

By so holding, the majority has apparently overlooked the decision of the U.S. Supreme Court expressly approving and enforcing the federal procedures for state assumption of jurisdiction, 25 U.S.C. Section 1321 et seq. (see Kennerly v. District Court of Montana, 400 U.S. 423, 27 L.Ed. 2d 507, 91 S.Ct. 480 (1971)), and the requirement under Utah law that the Attorney General be served and given an opportunity to be heard whenever it is asserted that a state statute is invalid (see Section 78-33-11 U.C.A. 1953).

B. APPELLANT'S RIGHTS AS AN ENROLLED MEMBER OF THE UTE INDIAN TRIBE RESIDING ON THE UINTAH AND OURAY RESERVATION HAVE BEEN ABOLISHED WITHOUT THE CONSENT OF CONGRESS.

As a reservation Indian, appellant has at least the following recognized rights and immunities: immunity from state income taxation (McClanahan v. Arizona Tax Commission, 411 U.S. 164, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973); immunity from sales taxation (Warren Trading Post Co. v. Arizona Tax Commission,

380 U.S. 685, 14 L.Ed.2d 165, 85 S.Ct. 1242 (1965)); immunity from personal property taxation (Moe v. Salish and Kootenai Tribes, __ U.S.__, 48 L.Ed.2d 96, 96 S.Ct. __ (1976)); the right of tribal self-determination (see 25 U.S.C. Section 450 et seq.); and the right to participate in tribal economic resources (see 25 U.S.C. Section 677 et seq.).

The majority opinion runs directly contrary to the well established and oft repeated rule stated as follows:

> It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property.
> Winton v. Amos, 255 U.S. 373, 391-2, 65 L.Ed. 684, 41 S.Ct. 342 (1921).

The Supreme Court has further recently noted that

> a holding favoring federal jurisdiction is required unless Congress has expressly or by clear implication diminished the boundaries of the reservation opened to settlement (emphasis in original).
> Mattz v. Arnett, 412 U.S. 481, 505, 37 L.Ed. 2d 92, 93 S.Ct. 2245 (1973).

Further contravened by the majority opinion is the established rule that,

> when Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress.
> U.S. v. Celestine, 215 U.S. 278, 285, 54 L.Ed. 195, 30 S.Ct. 93 (1909).

Given the clear status of the record establishing that the accident in question occurred within the exterior boundaries

of the existing Uintah and Ouray Reservation, as well as establishing the defendant's enrollment status in the Ute Tribe, the majority opinion's contrary conclusions based upon no record at all, constitute an unlawful usurpation of the congressional prerogative.

The majority opinion's reliance upon the distinguished authority of American Jurisprudence Second to terminate appellant's reservation requires us to supply the court with this further authority from that same source.

> The jurisdiction of the Federal Government over Indian tribes and over the members of such tribes while they are on Indian Reservations being exclusive, such Indians, while they are on their reservations, cannot be controlled or governed by the laws of the states within which the reservations are located. *** Nor can the state courts assume jurisdiction of a controversy involving Indians, where such controversy arose out of a transaction occurring on the reservation.... 63 Am Jur 2d Indians, Section 63. (Emphasis added)

C. THE MAJORITY OPINION HAS DENIED APPELLANT HIS RIGHT TO DUE PROCESS OF LAW.

The majority opinion itself denies appellant his right to due process of law in at least two ways: (1) The opinion denies to appellant the right to have this action heard in tribal court, the only forum having jurisdiction under both state and federal law; and (2) It further, denies him of this right without ever having given him notice or an opportunity to be heard herein on the issue upon which the majority opinion is based.

The case of Williams v. Lee, 358 U.S. 217, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959) denied to the courts of the State of Arizona any civil jurisdiction over a reservation Indian for a cause of action arising on the Indian's reservation. Like the instant case, that case involved a non-Indian plaintiff. The Supreme Court recognized the defendant Indian's right to have the action heard in his tribal court.

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. 358 U.S. at 223.

Not only has the majority taken this right away from appellant, they have taken it away by deciding this case on an issue not argued, briefed or raised by the pleadings or elsewhere in this Court or the District Court below. Appellant's due process rights have been violated both because of the arbitrary nature of the decision and because he had been given neither notice of the surprise nature of the decision nor an opportunity to be heard thereon.

Point III

THE MAJORITY OPINION'S RELIANCE UPON THE DE COTEAU DECISION IS MISPLACED AND UNSUPPORTED BY THE RECORD.

The De Coteau decision recites the strict criteria which

must be met in reaching the conclusion that an Indian reservation has been disestablished by Congress.

> This Court does not lightly conclude that an Indian reservation has been terminated. "(W)hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." (Citation). The congressional intent must be clear, to overcome "the general rule that '(d)oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" (Citation) Accordingly, the Court requires that the "congressional determination to terminate ... be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." (Citations) In particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government for the Indians' benefit. (Citations)
> De Coteau v. District County Court, 420 U.S. 425, 444, 43 L.Ed. 2d 300, 95 S.Ct. 1082 (1975).

A reading of the De Coteau decision, together with the Supreme Court's prior reservation status decision in the case of Mattz v. Arnett, supra, reveals that the U.S. Supreme Court requires a thorough and detailed examination of all aspects of the legislative, administrative and even social history surrounding a reservation before passing upon its current status. By comparison, the majority opinion herein is embarrassingly deficient.

Further, the operative historical facts in the De Coteau case are radically different from those surrounding the Uintah Reservation, which facts this court has never reviewed in any meaningful way. Indeed, the De Coteau decision would not support the conclusion of reservation disestablishment for the Uintah Reservation even if the facts were as they have been grossly misstated in the majority opinion.

The De Coteau decision did not mark a departure by the Supreme Court from its previous opinions on Indian reservation status. On the contrary, the Supreme Court expressly affirmed its prior holdings in the cases of Seymour v. Superintendent, 368 U.S. 351, 7 L.Ed.2d 346, 82 S.Ct. 424 (1962) and Mattz v. Arnett, supra.

The majority opinion of this Court places great significance upon the payment factor. The payment scheme for lands opened to homesteading under the Act of May 27, 1902, for the Uintah Reservation was not materially different from the schemes found in Mattz and Seymour. The majority opinion then compounds its factual errors by asserting that payments made to certain Ute Indians for loss of a Colorado reservation somehow affects the status of the Uintah Reservation in Utah. This is, of course, a non sequitur. The Colorado dealings had no effect on the Uintah Reservation except to resettle certain Ute Indians thereon. The majority opinion, in the same paragraph, digresses

from a discussion of payment for Colorado lands to the conclusion that Ute Indians in Utah lost all rights to their Uintah Reservation as a result thereof. Neither the historical facts nor logic support this conclusion.

Even assuming that the majority opinion had accurately stated historical facts showing that the government had paid the Indians for unallotted lands opened to non-Indians, this factor would not require or even justify reaching the conclusion that the Ute Indians have lost all interests in the Uintah Reservation. An Indian reservation, like a state or a country, is a jurisdictional boundary. There is no dispute that the Ute Indians do not own all of the land within the Uintah Reservation. But neither does the State of Utah own all of the land in the State of Utah.

Ownership of the fee title to land is essentially irrelevant to the question of governmental jurisdiction over the land. That jurisdiction depends upon other factors such as those established for an Indian reservation at Section 63-36-9 et seq. U.C.A. 1953. The De Coteau and other cited decisions clearly recognize and expressly hold that an Indian reservation can and often does continue to exist following the opening of the reservation to non-Indian settlement and the payment of the Indians for the lands so disposed. Indeed, the Utah Code itself likewise so recognizes at Section 63-36-18, which defines

an Indian reservation as including fee patented and right-of-way lands within the reservation.

The De Coteau decision considered two lower court cases which had reached opposite conclusions regarding whether or not the Lake Traverse Indian Reservation had been terminated by an 1891 Act of Congress. This 1891 Act ratified an agreement made with the Indians by which the Indians expressly agreed to "cede, sell, relinquish, and convey to the United States all of the unallotted land within the reservation." (Emphasis added) The agreement further provided for the payment of a sum certain for each acre of "the land ceded." (420 U.S. at 437). This agreement had been signed "by the required majority of the male adult tribal members" apparently in conformity to the consent requirement of the General Allotment Act. (420 U.S. at 436). A spokesman for the Tribe was reported as saying, "We are willing the surplus land should be sold. We don't expect to keep reservation." The record further showed "that the Indians wished to sell outright all of their unallotted lands" (420 U.S. 434-5).

Following the signing of the agreement, it was submitted by the President to Congress. The decision notes that each of the several committee reports which commented on the Agreement recognized that it effected

> a simple and unqualified cession of the unallotted lands to the United States for a sum certain. (420 U.S. at 438).

Congress included its ratification of the agreement in a comprehensive act which also ratified several other agreements providing for the "outright cession" of surplus reservation lands to the government. Indeed, the Act, like the agreement itself, used the language of "ceded, sold, relinquished and conveyed to the United States" to describe the effect of the agreement on the reservation lands.

Contrasting the finding in De Coteau with the facts of the instant case, the chief distinguishing factor is the nature and substance of the Acts involved. Whereas in De Coteau, the Congress was merely ratifying an agreement to which a majority of male adult tribal members had signed and by which they expressly agreed to "cede, sell, relinquish and convey" their interest to the United States, the relevant acts affecting the Ute's reservation were but unilateral acts of Congress, containing no express language of cession, and providing that the consent of the Indians was to be obtained.

The compensation scheme in the Ute Acts was similar to that found in the Mattz and Seymour cases, providing that "the uncertain future proceeds of settler purchases should be applied to the Indians' benefit" (De Coteau, 420 U.S. at 448), rather than "a straightforward agreement ceding lands to the government for a sum certain" (Id.) as was the case in De Coteau. The Ute Indians were not only not willing to agree to the disposal

of their lands, they refused specific and repeated efforts by the government to get them to consent. They did not expect that Congress would or could dispose of their lands without their consent because they had been repeatedly assured that the government would not do so. The Ute Acts do not show on their face, nor does the congressional history of the Ute Acts present a clear recognition of intent to terminate the Ute's reservation.

The De Coteau decision is important to the proper decision of this case to show, by contrast with the majority opinion, what the U.S. Supreme Court requires in the way of clear, express congressional intent to terminate an Indian reservation. The marked difference in the De Coteau facts and the instant case, by way of operative legislative language, clearly expressed congressional intent, and clearly established Indian assent and intent, demonstrates that a finding of disestablishment would be contrary to established principles of law and contrary to the facts appearing in the record of the case as well as the historical record. The relevant facts of this case are more nearly identical to those of the Seymour and Mattz cases which rejected reservation termination, and which cases were expressly reaffirmed by the Court in De Coteau.

CONCLUSION

A rehearing is necessary herein to allow the appellant the opportunity, required by a rule of this Court (U.R.E. Rule 12(4)),

to respond to matters judicially noticed for the first time in the majority opinion. Appellant has shown that there is a great mass of material which has not been considered and which is essential for consideration if this Court is to persist in disposing of this case on the unbriefed, unargued and "not raised by the pleadings" issue of reservation status.

On the basis of the foregoing, a rehearing is respectfully requested.

Dated: August 27, 1976

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